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No. 00-8452

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

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On Petition for a Writ of Certiorari to the
Supreme Court of Virginia

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENT TO QUESTIONS PRESENTED

Whether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment?

Daryl Renard Atkins respectfully submits the following as supplement to his petition for a writ of certiorari pending with the Court.

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S EXECUTION WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE PETITIONER IS RETARDED AND THERE IS NOW A NATIONAL CONSENSUS AGAINST EXECUTING THE MENTALLY RETARDED

On March 26, 2001, the Court granted certiorari review in *McCarver v. North Carolina*, ___ S. Ct. ___, No. 00-8727 (March 26, 2001), on the question of whether the execution of persons who are mentally retarded violates the Eighth Amendment ban on cruel and unusual punishment. McCarver had a Verbal and Performance Scale IQ of 70 and a full scale IQ of 67. *McCarver*, Petition for Writ of Certiorari, at 7.

Pretrial intelligence testing of Daryl Atkins showed that he had a full scale IQ of 59. *Atkins v. Commonwealth*, 534 S.E.2d 312, 312 (Va. 2000) ("*Atkins II*") (Hassell and Koontz, JJ., dissenting). "Less than one percent of the American population at large has a score of 59 or below." *Id.* at 323 (Hassell, J., dissenting). The mental health expert who interviewed and tested Atkins stated that Atkins was not "'faking' when he took the test," and concluded that he was mentally retarded based on his IQ score and his limited capacity for adaptive behavior. *Id.* at 322. The State's mental health expert testified that the testing and resultant IQ scores were correct. *Id.* at 323.[1]

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[1]As is the case in *McCarver*, the State offered evidence disputing the defendant's mental retardation.

The dissenting state court justices pointed out that Virginia "has never approved the imposition of the death penalty upon a defendant who is mentally retarded *and* had an IQ as low as 59." *Id.* at 322 (emphasis in original). In *Burns v. Commonwealth*, 541 S.E.2d. 872 (Va. March 2, 2001), decided after *Atkins II*, the Virginia Supreme Court rejected Burns' claim that a death sentence was not appropriate because of his borderline intellectual functioning (Burns had a full scale IQ of 77), because "we have approved the imposition of the death penalty for a defendant with a significantly lower IQ than that of Burns. *See Atkins v. Commonwealth*, 260 Va. 375, 387-89, 534 S.E.2d 312, 319-21 (2000) (defendant had IQ of 59)." *Burns*, 541 S.E.2d at ___ (page reference not yet available).

In *McCarver*, the Court granted certiorari to consider whether a national consensus against the execution of the mentally retarded has emerged and whether the execution of persons afflicted with mental retardation constitutes cruel and unusual punishment under the federal constitution. In *Penry v. Lynaugh*, 492 U.S. 302 (1989), a sharply divided Court ruled that the execution of the mentally retarded did not violate the Eighth and Fourteenth Amendments to the United States Constitution. In her opinion for the Court, Justice O'Connor wrote, "While a national consensus against the execution of the mentally retarded may someday emerge reflecting the 'evolving standard of decency that marks the progress of a maturing society,' there is insufficient evidence of such a consensus today." *Id* at 340. Since that decision, however, there has been a substantial change in American society, and Atkins contends that the execution of the mentally retarded now constitutes cruel and unusual punishment.

At the time of the decision in *Penry*, only the federal government and one state, Georgia, prohibited the execution of the mentally retarded.[2] This Court noted that in one additional state, Maryland, a law would soon take effect protecting the mentally retarded from execution.[3]

Since the decision in *Penry*, eleven more states — Arkansas, Colorado, Indiana, Kansas, Kentucky, Nebraska, New Mexico, New York, South Dakota, Tennessee, and Washington — have recognized the unusual cruelty and inhumanity of executing mentally retarded individuals and have outlawed the death penalty for mentally retarded persons.[4] When combined with the twelve states and the District of Columbia that have prohibited the death penalty altogether, that means the majority of jurisdictions in this country prohibit the execution of the mentally retarded. Given this "objective evidence of how our society views [this] particular punishment today," *Penry*, 492 U.S. at 331, this Court should find that execution of Petitioner would violate the federal constitution.

The Eighth Amendment does not have a static meaning in American jurisprudence. "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Therefore, in determining whether a punishment violates the cruel and unusual punishment clause of the United States Constitution, the question is not whether such punishment has always violated the constitution. The question is whether the punishment offends contemporary standards.

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[2] *See* 18 U.S.C. § 3597(c); Ga. Code Ann. § 17-7-131(j).
[3] *See* Md. Code Ann. Art. 27 § 412.
[4] *See* Ark. Code Ann. § 5-4-618 (1993); Colo. Rev. Stat § 16-9-401-403; Ind. Code § 35-36-9-1; Kan. Stat. Ann. § 21-4623; Ky. Rev. Stat. § 532.130-140; R.R.S. Neb. § 28-105.01; N.M. Stat. Ann. § 31-20A-2.1 (1978); N.Y. Crim. Proc. § 400.27; S.D. Codified Laws § 23A-27A-26.1; Tenn. Code Ann. Tit. § 39, ch. 13, pt. 2 § 39-13-203; Wash. Rev. Code Ann. § 10.95.030.

When this Court has determined that an aspect of a state sentencing scheme violates the national consensus, it has ruled that executions pursuant to that scheme violate the Eighth and Fourteenth Amendments. *See Woodson v. North Carolina*, 428 U.S. 280 (1976) (finding mandatory death penalty schemes to be unconstitutional); *Coker v. Georgia*, 433 U.S. 584 (1977) (finding death penalty for rape of adult woman excessive under the Eighth Amendment); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (finding death sentence for persons fifteen and younger a violation of Eighth Amendment); *Ford v. Wainwright*, 477 U.S. 399 (1986) (finding that execution of insane violations Eighth Amendment); *Enmund v. Florida*, 458 U.S. 782 (1982) (finding death penalty for robber whose co-conspirator kills someone during the robbery, without more, excessive under the Eighth Amendment).

McCarver has persuaded the Court that it is time for this Court to assess whether American society has changed significantly over the past decade to the point that the execution of the mentally retarded now violates American standards of decency. Recognition of such progress is consistent with this Court's Eighth Amendment jurisprudence. In 1976, the Court recognized a national consensus against previously constitutionally permissible mandatory death sentences and ruled that such punishments violate the Eighth Amendment. *Woodson, supra*. Execution for non-homicide crimes once were common and constitutional but, in 1977, the Court recognized a national consensus against executing people for crimes like rape. *See e.g., Coker, supra*. The Court serves this line of jurisprudence well by addressing whether there is now a national consensus against executing persons afflicted with mental retardation.

Petitioner asks this Court to grant *certiorari* in this case on the Supplement to the Question Presented or, in the alternative, to hold its decision in this case pending final resolution of the matter to be decided by the Court in *McCarver*.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari or other appropriate relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court. I further certify that on March 29, 2001, I caused the foregoing Petition for a Writ of Certiorari and accompanying Appendix to be served by first-class mail, postage prepaid, on Pamela A. Rumpz, Esq., Assistant Attorney General, 900 East Main Street, Richmond, VA 23219.

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